No. 89.

Brief of Wolcott & Vaile for

IN THE

SUPREME COURT

Filed Oct 28, 1897.

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

THE SPRINGER LAND ASSOCIATION, ET AL.,
Appellants,

vs.

PATRICK P. FORD,
Appellee.

No. 89.

BRIEF FOR APPELLEE.

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ERRATA.

On page 5:

In the sixteenth line, the word, "customs," should be, "constructions."

On page 10:

In the second line, "*Campbell*," should be, "*Derrickson*," and "41," should be, "48."

In the fourth line, the same case is unnecessarily repeated.

In the eighteenth line, the first word, "*they*," should be, "*the court*."

On page 29:

In the tenth line from the bottom, the first word, "*section*," should be, "*sections*."

On page 32:

The first four citations should appear *before*, and *not after*, the 4th paragragh; they are cited in support of the preceding paragraph, the "3rd."

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Statement.

The statement of facts with which counsel for appellants opens his brief, based upon the findings in the *nisi prius* court, is substantially correct, so far as it goes; but this court will be guided by the statements of the finding of facts made by the

Supreme court of New Mexico, which are fully, but succinctly, set out in the printed record, at pages 77-97, inclusive; which statement will, as opposing counsel suggests, be taken as conclusive and final, so far as the evidence is concerned, upon this review.

Assignments Relied Upon by Appellants.

Eight specific assignments of error appear in the record (pp. 116-117), six of which are again formulated by counsel for appellants, at page 9 of his brief. But in the body of his argument only three of said assignments are insisted upon, although in the discussion of these three propositions some of the other questions are incidentally touched upon. We shall therefore content ourselves with discussing only those points insisted upon by opposing counsel in his argument; conceiving that the other contentions embraced in the assignments of error are waived and abandoned.

ARGUMENT.

I.

Construction of Mechanics' Lien Laws.

It is hardly necessary that we should specifically follow the argument of opposing counsel upon this question, nor comment severally upon the authorities cited by him. There can be no question, at this late day, that the courts "all practically agree that the theory is beneficent, and that when the theory and purpose of the law is to do substantial justice to all parties who may be affected, the statute should be fairly construed, so as to advance the remedy and accomplish the ends of justice. Essential departures

from its plain and obvious requirements will be fatal; but it is sufficient if there is a substantial compliance, in good faith, with its provisions."

Phillips on Mechanics' Liens (2d Ed.), sec. 16, p. 27.

Ibidem, §§ 14-18, inclusive.

2 Jones on Liens, § 1556.

Davis vs. Alvord, 94 U. S. 545 (549).

Knabb's Appeal, 10 Pa. St. 186 (188).

Rogers vs. Omaha Hotel Co., 4 Neb. 59.

Lumber Co. vs. Russell, 22 Neb. 126.

DeWitt vs. Smith, 63 Mo. 262.

Calhoun vs. Mahon, 14 Pa. St. 56.

While all recognize this general principle, the decisions of each State differ somewhat in applying the principle to individual cases, the difference arising not from a fundamental difference of opinion as to the general principle, but from the necessity of conforming to the mechanics' lien law of the particular State wherein the decision is made, such laws being almost as various as the number of States in the Union. Hence, it is always necessary for the proper understanding and application of a decision passing upon rights arising under a mechanics' lien law, to examine the statute under which the decision was made; since propositions laid down in decisions frequently seem exactly applicable to a case under discussion, when, upon an examination of the statute under which such decision is made, it is found that that particular decision cannot possibly have any proper application to or influence upon the case in support of which it is cited. An examination of many of the authorities cited by counsel for the appellants in this case will exemplify the truth of this contention.

II.

Application of New Mexico Lien Law to This Case.

The first proposition discussed by counsel for appellants is, that the lien claim filed by the appellee in this case did "not contain any sufficient or correct statement of his demand."

The opinion handed down by the Supreme court of New Mexico in this case goes very fully, methodically and logically into a discussion of the essential features of a lien claim under the New Mexico statute. (See printed record, pp. 103-107, fols. 123-128, inclusive.) The New Mexico statute (N. M. Comp. L. 1884, § 1524) requires that the lien claim shall contain "a statement of the lien claimant's *demands*, after deducting all just credits and offsets." Referring to the claim filed by appellee (printed record, pp. 94-95), we find that the appellee's lien claim contained the *statement of two demands:* to-wit: 1st, *a demand* for "$17,634.27, the balance due and owing to said Patrick Ford by aforesaid owners or reputed owners, after deducting all just credits and offsets, for excavating and embankments done and performed by him, etc."; and, 2nd, *a demand* for "the further sum of $390, for extra excavating and hauling, ordered by the engineer in charge of said ditch and allowed by him in pursuance of the provisions of said contract.

As was said by the Honorable Supreme court of New Mexico, this lien claim "is in full and substantial compliance with all the essential requirements of the statute" upon this point. (Printed record, fol. 129.)

There is nothing, we submit, in the authorities cited upon this point by counsel for appellants which is inconsistent with, or contradictory of, this finding of the New Mexico court.

The case of *Warren vs. Quade*, 3 Wash. (State) 750, although decided, as suggested by counsel for appellants, under a statute similar to the New Mexico statute, does not in any sense pass upon the particular provision which opposing counsel rely upon here. There is no consideration or comment in said case of the provision of the statute requiring that the lien claim shall contain a "statement of his, demand"; and all that is said in the opinion in that case is expressly applied to other terms and provisions of the statute, which are in no way attacked by the appellants in this case.

With all due respect to the Washington court, we submit, further, that the propositions laid down by that decision are not in accord with well established customs and the almost universal trend of decision upon the questions discussed by the Washington court; and it is noteworthy that said court does not cite a single authority in support of the positions taken by it.

In the other Washington case cited by counsel for appellants, *Tacoma Lumber Co. vs. Wilson*, 3 Wash. 786, there is no separate discussion made, or opinion handed down, but a mere reference to the preceding case.

The contention of counsel for appellant is, that under this provision of the New Mexico law, the lien claim must not only contain a "statement of the claimant's demands," but must go further and embody an itemized account of the transactions between the parties. We submit that there is a radical difference between a "statement of demands" and "a just and true account showing what the materials were, the work that was done, and the price charged." The New Mexico statute simply requires a "statement of the demands" asserted against the property. In many other States the statutes require "a just

and true account" of the transactions between the parties. Under the general proposition with which we started out, each case is controlled by the statute out of which it arose. In New Mexico, "*a statement of the demands*" asserted *is sufficient*. In Pennsylvania, Missouri, Virginia, and some other States, "a full and true account" of the details of the transaction is by statute essential.

Let us examine some of the authorities relied upon by counsel for the appellee.

Null vs. Swineford, 6 Penn. 187, was under a statute which required that the lien claim should state "the amount or sum claimed to be due, and the nature and kind of the work done, or the kind and amount of materials furnished." In the particular case, the claimant simply claimed a lump sum, for both "carpenter's *work done* and *for lumber furnished;*" and the court held that this was a failure to comply with the statute, in an essential particular. But this very case expressly lays it down that "a substantial compliance with the statute is all that is required," and this proposition was approved and reannounced repeatedly thereafter; as, for instance, in 8 Pa. State, 473, 9 *Ib.* 449, 10 *Ib.* 186; in all of which *Null vs. Swineford*, was cited and approved upon this point.

Rude vs. Mitchell, 97 Mo. 366, *Heinrich vs. Carondelet*, 8 Mo. App. 588, and *Burns vs. Capstick*, 46 Mo. App. 397, were all decided under a statute radically different from the New Mexico statute and expressly requiring the filing of "a just and true *account*." But even under such a statute the Missouri courts, in *Hilliker vs. Francisco*, 65 Mo. 598, cited and approved in 20 Mo. App. 90, 28 Mo. App. 642, 44 Mo. App. 34, 104 Mo. 23, and other cases, held that, in a case such as the one now under dis-

cussion, an account containing simply a *lump item*, is sufficient.

The cases of *Shackleford vs. Beck*, 80 Va. 573, and *Valentine vs. Rawson*, 57 Ia. 179, were decided under statutes so radically different from the New Mexico statute that said decisions cannot properly have any influence or be of any value as guides to a proper decision of this point, under the New Mexico statutes. Furthermore, when we come to read the explanation of the ruling in *Valentine vs. Rawson*, as made in 69 Ia. 656, it is perfectly clear that even under the Iowa statute the Supreme court of that State did not intend to be understood as laying down any such proposition as that contended for herein by counsel for appellant.

In *Wagner vs. Hanson*, 103 Cal. 104, the statement made in the lien claim was ambiguous, so that it did not afford the clear and definite information which is contemplated in all mechanics' lien laws.

All of the authorities cited by counsel for appellant in support of his contention upon this point may be disposed of by the citation which he makes from 2 *Jones on Liens*, sec. 417:

> "Statutes, *which require a true account* of work done or materials furnished, imply an itemized or detailed statement of the transactions which are the foundation of the lien."

But there is certainly nothing in said text book, nor in the cases cited by opposing counsel, which can make such an itemized *account* necessary, under a statute *which does not require* any such thing, but only calls for "a statement of the claimant's *demands*." If the New Mexico legislature had intended any such provision as that which opposing counsel attempts to read into the statute, it would not have

required only "a statement of his demands," but would instead have called for "a statement of the *accounts*" between the parties, as do the statutes of the States from which appellants' authorities are cited.

> Phillips on Mechanics' Liens (2d Ed.), §§ 352-3.
>
> *Brennan vs. Swasey*, 16 Cal. 140.
>
> *Selden vs. Meeks*, 17 Cal. 130.
>
> *Heston vs. Martin*, 11 Cal. 41.
>
> *Young vs. Lyman*, 9 Pa. St. 449.

Nor was it necessary for the lien claim to state the relation existing between the claimant's employer and the owner of the property; the statute required the lien claim to contain, "the name of the owner or reputed owner," and

> "Also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract."
>
> Sec. 1524, Compiled Laws New Mexico.

A lien claimant is required only to meet, in a reasonable manner, the requirements of the statute under which he is attempting to perfect his lien. There is nothing in the New Mexico statute which requires in any way that the lien claim should state the relation between the owner of the property and the person by whom the claimant was employed, or to whom the claimant furnished materials.

Upon this point the requirements of the California statute are identical with the requirements of the statute of New Mexico. Under this California statute the Supreme court of California, in the case of *Lumber Company vs. Gottschalk*, 81 Cala., page 646, says:

> "There is nothing in the section, or any other, that requires the material man to state in his claim of lien what relation the person to whom he furnished the material bore to the owner, whether contractor or agent; nor does the burden of determining whether any contract, made or attempted to be made, between the owner and contractor was completed or not rest on him, when he comes to file his lien. He must state the facts required by the statute. Whether the person to whom he furnished the material had authority to bind the owner and entitle the material man to a lien, *is a matter of pleading and proof at the trial.*"

In this case it was determined that the contract between the owner and the person to whom the material was furnished, was void, and yet the lien was sustained.

It is not even necessary that the notice of lien should state that the owner of the land had knowledge of the work. It is sufficient if such knowledge be alleged and found.

Jewell vs. McKay, 82 Cala. 144.

III.

The second contention relied upon by appellants is that "the amount claimed in the lien was excessive, because no cause of action existed upon the final estimate." (Brief for appellants, p. 20 *et seq.*)

We have been unable to satisfy ourselves which of the assignments of error made in this cause (printed record, pp. 116-17) authorizes or covers the contention thus formulated by appellants. It certainly is not covered by assignment 2, since the law is now completely settled that a lien claim is not invalidated merely because the claimant claims therein *more* than he is entitled to.

Phillips on Mechanics' Liens (2d Ed.), § 356.

Edwards vs. Campbell, 28 N. J. L. (39) 41.

Edwards vs. Derrickson, 28 N. J. L. 39.

Shattuck vs. Beardsley, 46 Conn. 386.

N. S. I. Wks. Co. vs. Strong, 33 Minn. 1.

Smith vs. Headley, 33 Minn. 384.

Barber vs. Reynolds, 44 Cal. 519.

Thomas vs. Huesman, 10 Ohio St. 153.

If, then, the contention that the demand made in this lien claim was excessive is not covered by the second assignment of error, it does not seem to us that any other of the assignments are sufficient to entitle appellants to a review of this case, upon the ground of such excessiveness, if any existed.

As, however, it is a question between this Honorable court and the appellants, as to whether they will consider the contention if it is not covered by the assignments of error, we will proceed to consider the reasons which appellants advance in support of this proposition.

Their first reason is, that "the final estimate of $12,625.53 was not yet due;" and in support of this contention they quote a provision of the contract as follows:

> "The amount due to the contractor *under the final estimate* will only be paid upon satisfactory showing that the work is *free from all danger* from liens or claims of any kind, through failure *on his* [*Ford's*] *part* to liquidate his just indebtedness, as connected with this work."

The italics are ours, and we think that they demonstrate that appellants' contention is not well founded. From the findings of fact made by the

New Mexico Supreme court, the following are shown to be true:

First: That on the thirteenth day of June, 1889, when appellee's work was completed and accepted, and on June 19, 1889, when there was a conference between the various contractors, on the one hand, and their employers on the other, and on the third day of July, when Ford filed his notice of claim, there was *not* "*any danger* from liens or claims of any kind" by the subcontractors, as contemplated by this provision of Ford's contract.

Second: That if there was any danger from such liens or claims, it was *not through failure on Ford's part* to liquidate his just indebtedness in connection with the work.

Third: That the final estimate, which the contract authorized to be temporarily withheld, did not amount to the sum of $12,625.53, but that this sum embraced, in addition to said final estimate, the ten per cent reserved, and that, over and above this amount, there was also due the appellee considerably over $5,000 on the 6th (or May) estimate.

(1) Appellants repeatly contend, throughout their brief, that Ford is bound by the strict letter of his contract, and that no matter how unreasonable that contract may seem to this court, or how inequitable it may be to enforce it, nevertheless, the contract having been made, the parties are bound by it, and the court is bound to enforce it according to its letter.

Under the state of the facts disclosed by this record, we do not consider it important to inquire whether this contention of counsel for appellants is correct. But if such is the law, then unquestionably Ford's subcontractors are bound by the clear, unequivocal and positive provisions of their contracts

with him. One of the provisions of those contracts is (printed record, p. 92):

"That the amounts due the subcontractors on the monthly sub-estimates"—provided for in said contracts—"should in no case be demanded or paid in advance of the regular estimate,"—that is, the estimate to be made under the contract between Ford and The Springer Land Association.

The record clearly shows that promptly and invariably upon the payment of the regular estimates to Ford, his subcontractors were fully and completely paid; that the sub-estimates for the month of May and the final sub-estimates were not paid, because the regular estimate under the Ford contract for the month of May and the final estimate were not paid by Ford's employers, the appellants. Thus it will be seen that there never was any amount *due and payable by Ford* to his subcontractors or any of them. If they had instituted suits against Ford for the amounts due upon their subcontracts, they could not have recovered, because, under the express and unequivocal terms of their contract with Ford, those amounts never became due and payable by him to them.

Therefore we say that under the facts disclosed by this case, there was not on June 13 or June 19, 1889, and never was, *any danger of liens* successfully maintained, or of claims successfully asserted, by these subcontractors; and accordingly we find that although lien claims were filed and suits instituted by these subcontractors, yet at the time this case was tried, only one (that of subcontractor Dargle) of those claims or suits was in existence; and so far as this record shows, no attempt has ever been made to push that suit or enforce that claim by the lien claimant; from which the fact is necessarily apparent that the Dargle lien claim and

suit never amounted to anything, so far as these appellants are concerned. The decree, moreover, of the New Mexico court fully protected the appellants from any possibility of harm or loss by reason of the Dargle lien claim and suit.

(2) Now, going a step further: It is clear that if there ever was "any danger from liens or claims of any kind" upon this property, it was *not "through failure on Ford's part* to liquidate his just indebtedness, as connected with this work." The record shows that as rapidly as he was paid up by The Springer Land Association he paid off his subcontractors, as required by his contracts with them and by his contract with The Springer Land Association. He did not pay them the amounts of their respective sub-estimates for the month of May, for the simple reason that The Springer Land Association, without cause and without any excuse or any attempt at explanation or justification, failed to pay him the amount of the regular May estimate; and since the regular estimate had not been paid to him, there was nothing demandable of, or payable by, him to his subcontractors. The default in the payment was wholly by reason of the failure on his employers' part to liquidate their just indebtedness to him; and the record shows no just excuse for this failure and delay; for it clearly appears that it never occurred to these appellants to dispute the correctness and justice of Ford's claim until the nineteenth day of June, 1889, *nearly six weeks after the May estimate was due and payable* under the contract.

It is very suggestive to note here another instance of "How great a fire a little matter kindleth;" for it is clearly apparent, we think, from this record, that this whole controversy originated in, and grew little by little out of, a piece of bad temper on the part of subcontractor McGarvey. It is appar-

ent from the statement of facts (printed record, pp. 93-94) that the appellants, on the nineteenth day of June, 1889, sent their representatives to meet Ford, for the purpose of paying off the amounts due upon the estimates made by the engineer Kellogg and not questioned or disputed by the appellants, and of closing up the transactions under this contract. At that time, the May estimate and the final estimate, and the claim for extra work, were all in the hands of appellants. That they had no idea at that time to dispute the correctness of Ford's claim, or the faithful performance of his contract by him, is apparent from the fact that they sent their representatives with a deed to real estate representing $8,000, and cash or its equivalent to the amount of $17,000, which would be amply sufficient to pay their indebtedness to Ford, without deduction or controversy. All through the negotiations on the nineteenth of June, they were apparently offering and prepared to settle with Ford, at the figures fixed by their engineer, Kellogg; and the only things which stood in the way of the settlement in accordance with those estimates was a quibble between the Maxwell company and the Springer association, about the deed which was to be delivered to Ford, and between Ford and McGarvey over the paltry sum of $300. In the irritation of McGarvey, arising out of his dispute with Ford over this amount, while they were attempting to reach a satisfactory settlement between them, McGarvey suggested to the agent of The Springer Land Association that the work was not done according to the contract, and immediately the appellants broke off all negotiations, and utterly refused, and have since continued to refuse, to pay their debt to Ford, or any part thereof. The findings of the court show that this ill-tempered assertion of McGarvey's was absolutely untrue, and without foundation. Yet

appellants, on the nineteenth of June, 1889, and ever since, have made it the excuse for refusing to pay the appellee the moneys due him for work done for, and accepted, approved and ever since enjoyed by, them. Ever since that date they have enjoyed the benefit of his labors, and withheld the moneys which they solemnly bound themselves to pay therefor.

It is fair to presume and assert, that if these appellants had not jumped at the slander suggested by the irritated McGarvey, and made that an excuse for not carrying out their contract, the whole controversy would have been adjusted on said nineteenth day of June, 1889; for it is impossible to believe that so paltry a sum, comparatively, as $300 would have induced Ford and McGarvey, or either of them, to finally refuse to adjust their differences. Where $5,000 was in hand ready to be paid to the one, and more than $12,000 to the other, it would not have been in accordance with human nature for either of them to have failed to make some concession if necessary for the purpose of a settlement.

It is perfectly clear, therefore, that whatever liens or claims were made or filed by the subcontractors were not caused through *any failure on the part of Ford* to liquidate his just indebtedness, but solely on account of the failure of the appellants to pay their contract indebtedness.

The contracts between Ford and his subcontractors were made under the supervision of, and approved by, Kellogg, the authorized representative of the appellants. It is nowhere contended by the appellee that said subcontracts in any way abrogated the provisions of specification 15 of the principal contract, nor that the subcontracts in any way modified the effect of the principal contract or attempted to substitute a new contract therefor. Therefore it is not necessary for us to follow opposing counsel in

his discussion as to whether or not Kellogg's agency was sufficient to authorize him to make a new contract.

(3) The provision of the contract quoted by counsel for appellants at page 21 of his brief did not authorize or justify appellants to withhold the entire amount due Ford on the nineteenth of June, 1889. That provision only authorized them to temporarily withhold, if at all, "the amount due the contractor under *the final estimate*." Now, it will be seen from the record, that on the thirteenth day of June, 1889, when Ford's work was completed and was accepted by the engineer, that there was due Ford: 1st, the amount of estimate No. 6 (the May estimate), $5,010.93; 2nd, the ten per cent of the amounts of the six estimates, retained under the provisions of the contract, and amounting to one-ninth of $35,928.03, or $3,992; 3rd, by deducting this last amount from the footing on page 93 of the printed record ($12,625.53), we get the amount of *the final estimate* itself, $8,633.53; and, 4th, the amount due Ford for extra work done in accordance with the contract, $390. Thus we see that on the nineteenth day of June, 1889, the appellants owed to appellee $9,392.92, over and above the amount of the final estimate, and not including interest on overdue payments.

Even on the tenth of May, when the 6th estimate became due, the appellants had in their hands over $9,000 belonging to Ford, to-wit: the May estimate, $5,010.93, and the ten per cent retained, $3,992; the entire amount of liens claimed by the subcontractors, including the final sub-estimates, amounted to only about $7,500. Thus we see that counsel for appellants is incorrect in statement "1" on page 25 of his brief; and furthermore, we fail to see how the fact asserted would help his case, even if it were true.

The authorities cited by opposing counsel in support of his contention upon this branch of the case, as found at page 23 of his brief, do not aid him, because the facts show that *Ford had performed all the duties* incumbent upon him under the provisions of his contract, and brought him entirely within the rules laid down in those authorities; and also because those authorities are equally applicable to the contracts between Ford and his subcontractors, and they show that there was never at any time any amount *due by Ford* to said subcontractors under these contracts. Therefore, that any liens filed or claims made against this property did not result from any default or dereliction of duty on the part of Ford himself. They were made necessary by the defaults and wrongdoings of the appellants, in order that said subcontractors might protect themselves *as against said appellants*, and *not as against appellee*.

On page 26 *et seq.*, counsel for appellants advances, as a second reason why he contends that the lien claim was excessive, that appellants were entitled to "a credit of $8,000 for payment in land," which Ford agreed to accept in part payment of the final estimate. The court below found, and the recorded facts show, that the appellants never *delivered or tendered* to Ford any deed for such land. On the nineteenth of June, 1889, the agent of the Maxwell company had in his possession a deed conveying a section of land to Patrick Ford. This deed was not delivered or tendered to Ford, but the Maxwell agent notified the Springer agent that said deed was ready to be delivered to Ford upon payment of $4,000 by The Springer Land Association. The Springer agent notified Ford that he was willing to pay the $4,000, if Ford would settle with his subcontractors. Thus we see that the real fact was, that the deed was tendered by the Maxwell agent to

the Springer agent upon the condition that the latter would pay $4,000. The Springer agent did not perform the condition and accept the deed; he did not make any tender of the deed to Ford; but he simply notified Ford that if he, Ford, would perform a certain thing, which The Springer Land Association had made it impossible for him to perform, then he, the Springer agent, would obtain the deed for delivery to Ford. We see, also, that The Springer Land Association never put itself in a position to deliver or tender the deed to Ford, because they never had possession of the deed or any absolute and unconditional right to it.

Not only was there never any actual or constructive tender of the deed to Ford, but there never has been, from that day to this, any offer to deliver or declaration of a readiness or a willingness to deliver said deed. The appellants have wholly failed and refused to deliver any such deed, as they have failed and refused to pay any of their indebtedness to Ford; and this, notwithstanding the fact that long ago all the claims of the contractors have been adjusted and settled, and not one of them is in existence to-day; and notwithstanding another fact also: that there was due Ford, over and above said $8,000, at least $1,500 more that the total amount of all the demands of the contractors.

The authorities cited by appellants in support of this contention (see appellants' brief, pp. 28-31) have, we think, somewhat of a "boomerang" effect upon them. *Quoad* this deed, the appellants are "the parties seeking specific performance," and under their authorities they "must show, as a condition precedent to obtaining their remedy, that they have done or offered to do, and were at the time of the institution of this suit ready and willing to do, all the essential and material acts required of them

by the contract." The record shows that Ford carried out the conditions of the contract by him to be kept and performed. He selected the land; he made no objection to the deed, and would have been entirely willing to receive it, on either the thirteenth or the nineteenth day of June, 1889. All that is left undone in the carrying out of this contract remains unfulfilled on the part of the appellants; and therefore, under their own authorities, we submit that they cannot now call upon the appellee to accept this deed, nor can they complain of the court for failing to require him to accept it, when it clearly appears that they, who are now seeking equitable relief, have wholly and persistently failed to do equity, and when they have never indicated to the court nor to Ford a willingness or readiness to deliver the deed.

At page 31 of brief for appellants we find the contention that "the decree is clearly erroneous as to the sum of $390 claimed in the lien for extra work." The contract (specification 11; printed record, p. 80) provides for the doing of, and paying for, extra work. Specification 14 (on the same page) requires that all orders of the engineer concerning any part of the work must be promptly obeyed. Folio 70 of the record shows that extra work was performed, under the direction of the engineer, and that the bills therefor were authorized and approved by said engineer, to the amount of $446.85, of which no part, except $14, has ever been paid. At page 93 of the record, referred to by opposing counsel, the court states that the total amount, stated to be due Ford by the engineer's estimates, at the date of the acceptance of the work by the engineer, was $17,636.45. But it was evidently not intended that this amount should be understood to include the said $390 shown to be due for extra work. This was not a part of the engineer's estimate at the date of the

acceptance of the work, for the simple reason that, as the record shows (fol. 70), this extra work had been done, allowed, and the bill therefor authorized and approved, long before the date of the acceptance of the work; and the record (at fol. 118) clearly shows that at the date of the completion and acceptance of the work there was due $17,634.27 upon the engineer's final estimates, and also "$390 for extra work"; and it appears that at the time Ford filed his lien claim herein, and ever since, this $390, like the larger sum, has never been paid, in whole or in part. Since there can be no question, upon the record, that this amount was unpaid, and that the work represented thereby had been done, it was proper matter to be included in appellee's lien claim; and furthermore, appellants' brief (p. 32) shows that their counsel recognizes that their contention upon this point could not be sustained, and this lien claim invalidated, even if appellee's demand was overstated by the amount of this $390. The hesitating and half-hearted manner in which this contention is made shows that counsel for appellants has no confidence in it, and makes it unnecessary for us to spend further time over it.

As counsel for appellants does not in his brief contend for any other defect or insufficiency in the lien claim herein, it does not seem requisite for us to take the necessary time and space to show that this lien claim was in full compliance, in all respects, with the statute. This question is taken up in the opinion of the Honorable Supreme court of New Mexico, which appears at pages 101-115 of the printed record, and there the essentials of a lien claim under the New Mexico statute are taken up, item by item, and the lien claim herein shown to be

"in full and substantial compliance with all the essential requirements of the statute."

There is, however, one matter injected—incidentally, and apparently without any real reliance placed thereon—under the first contention of appellants attacking the sufficiency of the lien claim herein. At page 16 of appellants' brief we find it asserted that:

> "There is nothing in the claim, or contract attached to it, to show how the land of the owners, The Maxwell Land Grant Company, can be encumbered for the work done under a contract with an entirely different party.
>
> "When the work is not done for the owner of the property, the relation of the person for whom it is done occupies to such owner must be so stated as to bring him under the list of those who, under the lien law, are authorized to bind such owner."

The last paragraph of this assertion, as we have already shown, is not a correct statement of the law, under a statute such as that of New Mexico.

But it is not necessary to waste more time and space in showing the falsity of this contention; because, even if such *were* the law, the appellee brought himself fully within its requirements. Section 1520 of the statute (appellants' brief, p. 10) gives the claimant a lien upon the property, "for work done, etc., at the instance of the owner of the building or other improvement, or his agent," and expressly provides that "every contractor * * * or other person having charge of * * * the improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this act;" and section 1529 of said act (appellants' brief, p. 11) provides that "every building or other improvement

constructed upon any lands with the knowledge of the owner, etc., shall be held to have been constructed at the instance of such owner * * * unless such owner, etc. * * * shall give notice that he will not be responsible for the same, etc."

The record shows that in May, 1888, a contract was entered into between The Maxwell Land Grant Company and the predecessors of The Springer Land Association, for the construction of this irrigating system, for the purpose of improving the 22,000 acres of land mentioned in this case. Said contract is set out at pages 81-91, inclusive, of the printed record; and at folio 106 said contract expressly made The Springer Land Association "the agent of The Maxwell Land Grant Company," with plenary powers in the premises to do all acts necessary to carry out the improvement proposed, and to sell and dispose of the lands proposed to be benefited by said improvement. Under and by virtue of this contract, The Springer Land Association employed the appellee to construct the improvement provided for in its contract with The Maxwell Land Grant Company. The record bears internal evidence that all through the transaction between The Springer Land Association and appellee, The Maxwell Land Grant Company was aware of what was going on; so much so, that when the appellee's work was completed and accepted, and the day of final settlement came, the Maxwell Company sent its representative to be present at, and carry out its portion of, said settlement. Under this state of facts, it seems to us impossible to escape the conclusion that the appellee was entitled to a lien upon this 22,000-acre tract of The Maxwell Land Grant Company, both under said section 1520 of said statute and under section 1529 thereof.

Moreover, upon this point we submit that it was wholly a question of fact as to whether or not the

Maxwell Company, the holders of the legal title to this tract, were the persons at whose instance this improvement was made; and it was also a question of fact as to whether or not the Maxwell Company knew, at the time this work was going on, that the improvement was being made, so as to bring them within the terms of said section 1529. The New Mexico courts, both District and Supreme, found for the appellee upon both of these facts; and we submit that their finding will by this court be taken as conclusive of the matter.

In section 1522 of said act (appellants' brief, p. 10) we find that the lien given is upon the land belonging "to the person *who caused the improvement to be constructed.*" Unquestionably, the Maxwell Company was the party who caused this improvement to be constructed, for it was "projected," authorized and contracted for by the contract of May, 1888, and detailed specifications therein made, as to how, when and by whom the improvement was to be carried out.

IV.

The third and last contention upon which counsel for appellant relies in his brief is, that there could be no lien upon the 22,000 acres of land which lie outside of the land actually covered by the right of way for this irrigating ditch.

The statute gives a lien: 1st, upon the improvement itself; 2nd, upon the land upon which the improvement is constructed; 3rd, upon so much of the land as may be required for the convenient use and occupation of the improvement.

The meaning and extent of the third item is the only one as to which there is any controversy in this case. The appellants contend that appellee's lien only attached to the strip of land, sixty feet wide

and twenty-six miles long, upon which the improvement was actually constructed. The appellee contends that the entire 22,000-acre tract of land is required for the convenient use and occupation of the improvement constructed. As we have already demonstrated, from the record, this 22,000-acre tract is admitted to belong to the Maxwell Company, and the record shows, by documentary evidence, that this company was "the party who caused the improvement to be constructed" upon said land.

The statement made by counsel for appellants, at page 34 of his brief, purporting to be declarations of the New Mexico court, we submit is inaccurate and misleading. That court did not *declare* that this 22,000 acres of land was "outside of the ditches and reservoirs and the right of way for the same." These words were used descriptively, and not declaratively, and they lose their proper significance and effect when segregated from the sentence and connection in which they are used. The New Mexico court did not say that a number of these 22,000 acres, or that any portion of them, was not flooded, or situated so as to be irrigated, with water from this ditch. This language was used in reference to "the particular sections described in the pleadings," which the appellants contend contain nearly 30,000 acres; and the court, in using the language quoted by counsel for appellants, used it in reference not to said 22,000 acres of land or any part thereof, but, on the contrary, said "that in a number of said sections only portions of the section were selected, because a number of them were not flooded nor situated so as to be overflowed with water or irrigated from the ditch." The court is, in this sentence, speaking of the "sections" mentioned in the contract of May, 1888, apparently, and the sections mentioned in the lien-claim were selected by the Springer Association

because they are under or appurtenant to this irrigating system.

The description of the land claimed in the lien claim, being in accordance with the United States survey, and being particular, is the description which controls; the mention of 22,000 acres being a matter uncertain in its nature as connected with a more particular description in accordance with the government survey.

The appellants' counsel makes an argument from an alleged discrepancy between the acreage of the land given, to-wit, 22,000 acres, and the number of sections specifically mentioned, to-wit, forty-six sections, and deems this matter of discrepancy such a capital point that it is urgently pressed at two places in the appellants' brief.

(See appellants' brief, pages 39 and 40.)

This argument is based upon the supposition that every section contains 640 acres of land, and that, as there are forty-six sections mentioned, there must be 29,440 acres included in the description, while only 22,000 are claimed, and counsel naively say: "which 22,000 acres is intended does not appear, nor could any man searching the records for the title to any quarter section within the forty-six sections named ascertain from the claim whether it was included in the 22,000 acres or not."

Counsel have overlooked a fundamental principle affecting surveys of public lands which necessitated a statutory provision as to government surveys, and that is, that a congressional township of thirty-six sections does not necessarily contain thirty-six times 640 acres. That by the very necessity of surveying, a necessity which arises from elementary facts, which, of course, it is not necessary here to explain even for the benefit of counsel for the appellants, there is almost invariably either an excess or a

deficiency in the acreage in a township, and to provide for this necessary fact, a statute of the United States particularly enacts as follows:

> "Where the exterior lines of the townships which may be sub-divided into sections or half sections exceed or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the *western and northern ranges of sections or half sections* in such township, according as the error may be in running the lines from east to west or from north to south. The sections or half sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity."
>
> Revised Stats. U. S., p. 439, sec. 2395, 5th clause.

If the distinguished counsel for the appellants will upon a plat locate the particular sections designated in the claim of lien in this case, he will find that out of the forty-six sections named, nine of them are in the *northern range of sections* in the townships in which they are located. He will also find, upon a similar examination, that seven of these designated sections are upon the *western range* of sections in the townships in which they are located. Therefore, out of the forty-six sections there are sixteen which are subject to a possible deficiency which may fully cover the entire difference between the 22,000 acres and 29,440 acres, and as the appellants, defendants in the court below, did not introduce any evidence to show the actual acreage of the sections named, they can now derive no argument such as is attempted in appellants' brief.

In view of this argument of counsel for appellants, it is worth while to note, also, that appellants are estopped from making any contention of a discrepancy between acreage and description, by reason of the fact that the answer in express terms admits both description and acreage, in the very terms alleged in complainant's bill and in the claim of lien.

See Printed Record, p. 21, fol. 103.

"There is a great reluctance to set aside a mechanics' lien merely for a loose description."

Phillips on Mechanics' Liens (2nd Ed.), § 379.

McClintock vs. Rush, 63 Pa. St. 203.

"It is not necessary that the description should be either full or precise. Certainty to a common intent is the rule."

McClintock vs. Rush, 63 Pa. St. 203.

Kennedy vs. House, 41 Pa. St. 39.

Whitelake Lumber Co. vs. Russell, 22 Neb. 126.

Dewitt vs. Smith, 63 Mo. 263.

"The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description."

Devlin on Deeds, vol. 2, sec. 1044.

The mention of 22,000 acres in the lien claim is an immaterial matter, and goes simply in aid of the description, and if inaccurate is controlled by the particular description of metes and bounds, or by description in accordance with the United States government survey.

The assertion of quantity in a deed must yield to a description by metes and bounds, or by name and number.

Stanley vs. Green, 12 Cala. 148.
DeArguello vs. Greer, 26 Cala. 632.
Wadhams vs. Swan, 109 Ill. 46.
Ufford vs. Wilkins, 33 Iowa, 110.

In ascertaining the land that has been conveyed by a deed, a call for quantity will be rejected when inconsistent with the actual area of premises as particularly described.

Ware vs. Johnson, 66 Mo. 662.

Metes and bounds will convey the land embraced by them, although the quantity vary from that expressed in the deed, on the principle that the less must yield to the greater certainty.

Belden vs. Seymour, 8 Conn. 18.
Hatch vs. Garza, 22 Texas, 177.

Where a deed describes land by government survey and by metes and bounds as containing 702 acres, held, that the words as to quantity were descriptive.

Wright vs. Wright, 34 Ala. 194.
Powell vs. Clark, 5 Mass. 355.
Large vs. Penn, 6 S. & R. 486.

Quantity must yield to boundaries or numbers if they do not agree.

Doe vs. Porter, 3 Ark. 57.
Chandler vs. McCard, 38 Me. 564.
Large vs. Penn, 6 S. & R. 486.
Jackson vs. Livingston, 15 Johnson, 470.

Dale vs. Smith, 1 Delaware Chan. 1.
Jennings vs. Monk, 4 Metcalf (Ky.), 106.

It must be noted, however, that, because only 22,000 acres are mentioned as being the quantity of land "outside of the ditches and reservoirs and the right of way for the same to which the 22,000-acre tract is appurtenant," it by no means follows that *all the sections of land*, named in the lien claim, were not properly included therein and covered thereby. Over and above these 22,000 acres, there was the land which, even the appellants admit, is properly chargeable with the lien, to-wit, the land actually covered by the ditch system and its right or rights of way and by the reservoirs constructed in connection with it. As the ditch itself was twenty-six miles long it necessarily covered a considerable acreage; and there is nothing to show how much land was covered by the various reservoirs, and the residue of the irrigating system which appellee constructed, but, in the very nature of things, these must have also required a considerable acreage. It would not be unreasonable to presume that these took all the land, outside of said 22,000 acres, which is contained in the sections named in the appellee's lien claim and in his bill of complaint, and as the court below decreed him a lien upon all the land contained in the section described, this court is bound to conclude that all of such land was included in said 22,000-acre tract and the land occupied by the said ditch, reservoirs constructed by appellee, and the rights of way belonging thereto.

The court expressly holds (p. 96) "that it appears by the admissions, pleadings, and from the testimony, that the 22,000 acres of land outside of the ditches and reservoirs and the right of way for the same, were appurtenant to the said ditch and

reservoirs, and were under said ditch and to be irrigated thereby. Thus it will be seen that each and all of these 22,000 acres were appurtenant to and irrigated by this ditch, and were intended to be, and were, benefited by the ditch. And the court goes further, and says, incidentally, that not only these 22,000 acres but all of the various sections situated between the line of said ditch and the river were enhanced in value by reason of its construction.

The contract of May 1, 1888, shows that the Maxwell Company caused this improvement to be made, for the purpose of supplying water to the entire 30,000 acres of land which were under said ditch; and in consideration of the construction of this improvement, they gave to The Springer Land Association a one-half interest in 20,000 acres of the 22,000-acre tract, the other 2,000 acres being reserved by the Maxwell Company. (Printed record, p. 97.)

In said contract said 22,000 acres are not spoken of as separate and distinct tracts or parcels of land, as appellants would now have this Honorable court believe them to be; but it is expressly spoken of as "said tract of 22,000 acres." (Printed record, p. 83.) The contract evidently contemplated that after the improvement was constructed, said 22,000-acre tract should be cut up and sold in small holdings; and the Maxwell Company caused the improvement to be made for the express purpose of making saleable a portion of its large holdings, which up to that time were evidently without market value and unavailable for agricultural purposes. But at the time the improvement was projected and constructed, it was upon the property *as an entirety*.

When the statute gives a lien upon the land *upon which* an improvement is constructed, it must be understood in a reasonable and ordinary sense. There can be no sufficient reason why this language,

when used in the statute, must have one meaning, and when used in the contracts between the parties must have an entirely different meaning. The contract of May 8, 1891, distinctly shows that this 22,000-acre tract was the *land upon which* this improvement was to be constructed. It repeatedly speaks of said 22,000 acres as being "*under* said ditch system." (Printed record, fols. 97, 99, 102, 107.) No amount of sophistry can possibly be sufficient to limit the land upon which a lien is given by section 1522 to the actual right of way occupied by this ditch; more especially as section 1529 clearly shows that it is not the land actually occupied by the improvement, but the tract which is intended to be benefited thereby, which is made subject to the lien. This latter section expressly provides that the lien shall subject the owner's entire interest in the lands *upon which* the improvement is constructed with his knowledge.

Such are the facts of the case, and we submit that the contention now made by appellants is not now tenable in this court:

1st, because the appellants are estopped from making any such contention, since they expressly admit, in their pleadings, that all of this 22,000-acre tract was appurtenant to, and covered and benefited by, this improvement;

2nd, because the documentary evidence appearing in the record positively and clearly shows that such was the fact;

3rd, because the New Mexico court distinctly found, upon a consideration of all the evidence, that all of this 22,000-acre tract was appurtenant to this improvement, covered and benefited by it, and necessary to its convenient use, for the purposes contemplated in its construction; which findings of fact are

conclusive upon this appeal and will not now be enquired into by this court; and,

4th, because the law, as applied to the facts appearing in this case, justifies and requires the affirmance of the finding of the court below, that all of this land was "required for the convenient use and occupation of said improvement."

2 *Jones on Liens* (1888) §§ 1368 and 1372.
Derrickson vs. Edwards, 39 N. J. L. 468.
Green vs. Chandler, 54 Cal. 626.
Keppel vs. Jackson, 3 W. & S. 320.

In support of this last proposition we beg to submit the following authorities:

> "In general the lien attaches not only to the land which the building covers, but to the lot of land upon which it stands, and whatever belongs to the lot and is necessary to the enjoyment of the premises. This is a question of fact, not of law."
>
> 2 *Jones on Liens* (1888), sec. 1368.
>
> "The land covered by the lien is generally the whole lot of land belonging to the owner, on which the building is erected, unless the amount of land is restricted or defined by the statute. The court will not restrict the lien to the buildings and the land covered by them, and if they limit the lien to a less quantity of land than the whole lot they will embrace in the lien also the land about the buildings, used with them and necessary or reasonably convenient for their use."
>
> *Ibid.* 1369.
>
> "How much land is necessary for the convenient use and occupation of a building

> and subject to a lien for work and material used in the building, is properly a question for the jury, and oral evidence is admissible to determine it. Testimony showing that the land and buildings had been leased together and sold together tends to show that the lands and buildings are treated as a unit and used for a common purpose, and in the absence of other testimony the court may properly infer that the land so used and treated was reasonably convenient for the use and occupation of the building."
>
> *Ibid.* 1372.

In *Tunis vs. Lakeport*, 98 Cal. 285, cited by counsel for appellants, we find the general principle laid down in the following language:

> "The expression 'the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof,' should be construed to mean such space or area of land *as is necessary to the enjoyment of the building for the purposes in view of its construction.*"

In *Edwards v. Derrickson*, 28 N. J. L. 39, the court said (pp. 44 *et seq.*):

> "The quantity of land made subject to lien by the act is not merely the land on which the building is actually erected; this is included in express terms, but in addition to this the lot or curtilage on which the building is erected is also subjected." * *
>
> "Here, too, the question is not so much the size of the lot or parcel of land as whether it is one single parcel of land lying together, known as one tract, bought and sold as such, its metes and boundaries generally known and as being the lot, tract or

> parcel of land which the parties naturally understood as those which were appurtenant to or connected with the building or buildings after they should be erected. This is what is meant by the law when it gives the contractor a lien on the building and the lot and curtilage on which it is erected."

We respectfully beg that this Honorable court will read and consider what is said by the New Jersey court upon this subject, at pages 44-48 of their published opinion, as all of it is especially pertinent and instructive upon the question now under discussion, and yet the quotation is too extensive to justify us in inserting it bodily in this brief. It will be seen in this case that for repairs made to the Phenix Mill, the contractor was adjudged a lien on all the tract of land on which the mill stood, amounting to fifty-three acres, and embracing several dwelling-houses and other buildings.

In *Nelson vs. Campbell*, 28 Pa. State, 156, the court gave the claimant a lien upon an entire city lot, embracing several buildings and a stable, upon the ground that (p. 160) "all the property was intended to be improved by each building, and all are therefore subject to the lien."

In *St. Louis Natl. Stock Yards vs. O'Reilly*, 85 Ill. 546, the work was done on a hotel building and a bank building, erected on U. S. Survey No. 627, containing 400 acres, situated near East St. Louis; and the court gave claimant a lien on the entire 400-acre tract.

In *G. P. Storage Co. vs. Southwark Foundry Co.*, 105 Pa. State, 243, upon a claim for work done and materials furnished upon certain grain elevators erected upon a 130-acre tract, the court said:

> "If it is in fact true that all this is but the proper curtilage for the buildings against which the lien is filed, then will that lien cover it."

In *Davis vs. Auxilliary Company*, 9 So. Car. (Richardson), p. 204, the court says:

> "The word 'lot' in its most comprehensive sense might include the whole tract of land upon which any buildings might be situated, without regard to the dimensions of the tract, or the nature of the building. In its most limited sense, the word might be confined to the area actually covered by the building, as the land beneath a residence, but without means of approach. In the latter, the security intended by the statute would be deprived of all value, while in the former the law would be unreasonable and oppressive. When a word has various significations, and its meaning in a statute comes in question, that which is most reasonable is adopted by the court, in the sense in which it is used by the law-makers, and that sense is most reasonable which accords at once with the established principles of law and the manifest intention of the legislature."

In this case, it appears that the buildings erected were a grand-stand and a judges' stand, on a race-course; that there were four tracts of land, parallel to each other and contiguous. Appellant, for whom the buildings were erected, was in possession and control of all four tracts, but held the absolute title to only one of them—tract No. 3. Neither of the buildings was upon tract No. 3, and it was contended by the appellant that this tract No. 3 had been improperly held to be a part of the lot "of land on which the buildings are situated." The court says, on page 207:

"No difficulty arises from the facts in this case, if the law thus announced is sound. The several tracts, 2, 3 and 4, were bought, procured and held for a common and avowed purpose. They were together enclosed by a common fence. The track which passed from the three was marked by a common fence on the inner side. They constituted one parcel, adjacent to the main building and occupied by the smaller. They were used together for a special purpose, and the buildings were erected exclusively to aid in this purpose. The entire lot, containing the three tracts, should properly be regarded, for the purposes of the suit, as the lot of land on which the buildings were situated."

The statute provided as follows:

A builder "shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated."

In *Roby vs. University of Vermont*, 36 Vermont, 564, the court says:

"In this case, the court held that the lien created by the proceedings set forth, rested only upon the building upon which the work was done, but carried with it such right to the land upon which the building stands, *and which is appurtenant* to it, as should be necessary to enable the orators to hold, appropriate and use the building for all the legitimate purposes to which such building might be put, in order to render it available as property in its full value and usefulness."

In *Executors of Vandyne vs. Vanness*, 1 Halstead (N. J. Eq.), 485, the following appears on page 490:

"The extent of the lien, as to the subject of it, is shown by the mode pointed out in the act of enforcing it by law. It is to be enforced at law by judgment for the claim filed, and execution against the building and land on which the same is erected. The lien, therefore, is on the building and land on which it is erected."

On page 491 is the following:

"On what land are the claims liens? The act says, *the building and the land* on which it is erected. Is it only the land which the building covers, or is it all of any distinct tract of land on which the building stands? It seems to me it must be one or the other. If it be not confined to the land covered by the building—and this, I think, would be an absurdity—it must be the tract on which the building stands, for, if this be not so, we must make the equally absurd supposition that the legislature intended that the parties, or one of them, or the court, should determine what part of the tract should be subject to the lien; that is, how much of a tract, besides the foundation, a house shall be held to stand upon."

And in concluding, on page 492, the chancellor says:

"It was said, in argument, that the carpenter would get a lien on the entire tract of land, as security for a house he might build on it. I see no reason why he should not, in good sense, and under the language of the act, have a lien on so much of the land, including the house, as will pay for the building of the house; and unless you can confine him to the ground covered by the house, there can be no other rule."

But it does not seem necessary to farther multiply citations or authorities; for the general principle

for which we contend is recognized in the authorities cited upon this point by counsel for appellants. We could not wish for any clearer or more conclusive enunciation of the legal principle applicable to the question than that which we have above quoted from *Tunis vs. Lakeport*. In that case the work was done on a hotel and saloon erected upon or near a tract of land which was used as a race-track and contained the usual buildings and improvements incident to that business. The court below gave a lien not only upon the hotel and saloon buildings, but also upon the adjoining grounds. The Supreme court reversed the case, upon the ground that the race-track and improvements were not appurtenant to, or necessary to the convenient use and occupation of, the hotel and saloon property.

Of the other two cases, *Green vs. Chandler*, 54 Cal. 626, turned solely upon a question of pleading, and has no pertinency to or bearing upon the question in support of which it is cited by opposing counsel.

In *Cowen vs. Griffith*, 108 Cal. 228, cited by opposing counsel, there was a dwelling-house erected upon one of two contiguous twenty-acre lots. The lots were highly improved and planted in vine and fig trees. The trial court, for work done upon the dwelling-house, gave a lien upon the entire forty acres; and the California Supreme court, while recognizing the general doctrine for which we contend, held that under the facts of that particular case the judgment of the court below was excessive; and they also suggest, in passing (although this latter is altogether *obiter*, and, we think, improper, inasmuch as it trespassed upon the province of the jury in the next trial of the case) that in their opinion even twenty acres was, under the circumstances of the

case, excessive. But they nowhere suggest, or even countenance, the doctrine that the lien should be confined to the land actually occupied by the improvement.

Applying, then, the principle announced in the foregoing authorities to the case at bar, we find that this entire 22,000-acre tract "is required for the convenient use and occupation" of this ditch and irrigating system constructed by appellee. Disconnected from the land, the improvement is absolutely worthless. Without the improvement, the land and every part of it was valueless and unmarketable. To say that the appellee was only entitled to a lien upon the strip of land sixty feet wide, upon which the ditch was actually constructed, is to make the security given him by statute absolutely worthless.

This improvement is not such an one as the hotel building involved in *Tunis vs. Lakeport, supra*. The hotel and saloon could easily be operated and conveniently used without the tract of land adjoining. The nature of their business is such that their custom would come from an entirely different source, and any benefit that they would have received from the race track would not have come directly from the track property itself, but would have come from the persons who were incidentally attending upon said race track: so that any benefit which the hotel building derived from that property would not have been direct, but simply remote and speculative.

But in the case at bar this ditch is directly dependent upon the land, and the land directly connected with and dependent upon the ditch; neither could be "conveniently used or operated" without the other.

Nor is this improvement like a mill, built upon a tract of land: because, no matter how large the

tract of land surrounding such a mill, the bulk of its business would necessarily, in the ordinary course of affairs, come from outside of, and be in no way dependent upon, the tract of land. Consequently, we find some cases which in such instances confine the lien to the mill building itself and the adjacent property which is absolutely essential to and directly connected with the milling business.

But in the case of the improvement now under consideration, this ditch must expend its waters upon the said 22,000-acre tract, for there was no other way in which they could be conveniently or at all used. The ditch was constructed upon this 22,000-acre tract, and its use was wholly appurtenant to, and dependent upon, this tract of land, for the record shows, either positively or by necessary implication, that no other lands were reached by this improvement.

The bill of complaint alleges that these lands are appurtenant; the answer admits it. The findings of the court are that the lands are appurtenant to the ditch, and the decree orders that so much of the lands described as may be necessary to pay the principal, interest and costs be sold.

A ditch requires much more land for convenient use and occupation than a house. A lien will attach to land for the building of a fence, and it would be preposterous to say that the amount of land to which such lien would attach for building a fence would be only a convenient space for repairing the same. Appellee contends that the term "convenient use and occupation of the improvement" means all the land that is appurtenant to, is benefited by and for which the improvement was intended. The lien alleging that it is appurtenant, the bill of complaint

alleging to the same effect, and the finding of the court being in accordance therewith upon the evidence, this is conclusive in the court above.

If it should be contended, or even suggested, that this 22,000-acre tract was *not all* required for the convenient use and operation of said ditch, where is the division to be made between that which is required and that which is not required? The court below found that it was all required, and we submit that under the authorities already cited, that is conclusive upon this point. But if it were not, where in this record can this Honorable court find the data necessary to select out and segregate those portions of this 22,000-acre tract upon which appellee is entitled to a lien, from those portions which should be declared free from any lien? Thus we see that the controversy is absolutely narrowed down to this position, to-wit: that the appellee was either entitled to a lien upon *this entire 22,000 acres*, or he was not entitled to a lien *upon one single acre* of that tract, or upon anything outside of the sixty-foot strip upon which the ditch was actually located. We do not believe that any justification can be found, in law, authority, statute, justice, or reason, which would confine appellee to the narrow right of way actually occupied by the improvement; and if we are correct in this position, then it unavoidably follows that he was entitled to the lien adjudged to him by the court below upon this entire 22,000-acre tract, which "is appurtenant to and covered by this improvement," and which is "necessary to the enjoyment of the improvement for the purposes in view" by the appellants and each of them, when they caused it to to be constructed.

In conclusion, we most respectfully submit that none of the positions taken by opposing counsel in

his brief are tenable, and that, both under the law and under the facts, the adjudication of the New Mexico court is correct and should be affirmed.

Respectfully submitted,

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